

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1287

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN RE THE GRAND JURY EMPANELLED
October 14, 1976

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT WITNESS SUBPOENAED
TO TESTIFY BEFORE GRAND JURY

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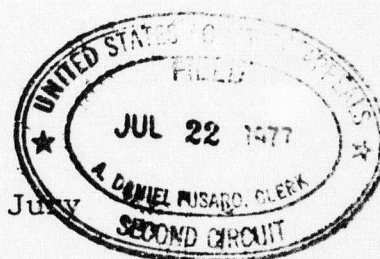


TABLE OF CONTENTS

	<u>PAGE</u>
Issue Presented	2
Statutes and Rules	2
Statement of the Case	3
A. The Proceedings Below	3
B. The Facts Relevant to This Appeal	6
ARGUMENT	
POINT I	
The Grand Jury Secrecy Rule is Not Applicable	12
POINT II	
Even if These Materials Were Within the Scope of Rule 6(e), Sufficient Need Exists Requiring Disclosure	22
CONCLUSION	29

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Capitol Indemnity Corp. v. First Mississippi Construction Co.</u> , 405 F.Supp. 929 (D. Mass. 1975)	12n, 13, 19
<u>Commonwealth Edison Co. v. Allis Chalmers Manufacturing Co.</u> , 211 F.Supp. 729 (N.D. Ill. 1962)	13
<u>Davis v. Romney</u> , 55 F.R.D. 337 (E.D. Pa. 1972)	12n, 13, 17-18, 21
<u>Dennis v. United States</u> , 384 U.S. 855 (1966). . .	23
<u>In Re Biaggi</u> , 478 F.2d 489 (2d Cir. 1973). . . .	22, 27
<u>In Re Braniff Airways, Inc.</u> , 390 F.Supp. 344 (W.D. Tex. 1975)	12n, 20, 24-25, 24n
<u>In Re Hearings Before The Committee On Banking And Currency Of The United States Senate</u> , 19 F.R.D. 410 (N.D. Ill. 1956) vacated on other grounds, 245 F. 2d 667 (7th Cir. 1957)	13
<u>Pittsburgh Plate Glass Co. v. United States</u> , 360 U.S. 395 (1959)	23
<u>Smith v. United States</u> , 423 U.S. 1303 (Douglas, Circuit Judge, 1975).	23
<u>United States v. American Radiator and Standard Sanitary Corporation</u> , 45 F.R.D. 477 (W.D. Pa. 1968)	27-28, 28n
<u>United States v. Carter Products Inc.</u> , 27 F.R.D. 243 (S.D.N.Y. 1961)	22
<u>United States v. Interstate Dress Carriers, Inc.</u> , 280 F.2d 52 (2d Cir. 1960).	13, 16-17

CASES

PAGE

<u>United States v. Procter & Gamble Co.</u> , 365 U.S. 677 (1958)	23
---	----

RULES AND REGULATIONS

Fed. R. Crim P. 6(e)	1, 2-3, 4, 12, 13, 14, 14n, 15-16, 18, 18n, 21, 22, 22n, 23, 25, 27, 28, 28n
--------------------------------	---

OTHER AUTHORITIES

Sachs, S. H. and Levin R.B., <u>Preparing Grand Jury Witnesses:</u> <u>Some Practical and Legal Points,</u> LITIGATION, Spring, 1977 at 26	19
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Docket No. 77-1287

IN RE THE GRAND JURY EMPANELLED
October 14, 1976

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLANT WITNESS SUBPOENAED
TO TESTIFY BEFORE GRAND JURY

Appellant, a witness subpoenaed to testify before a Grand Jury empanelled in the Southern District of New York on October 14, 1976 (hereinafter the "witness"), submits this brief in support of his appeal, pursuant to 28 U.S.C. §1291, from the Order of the United States District Court for the Southern District of New York (Hon. Richard Owen, J.), dated and entered June 30, 1977, which denied his motion pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure to compel the Department of Justice (hereinafter the "Department") to allow him access, prior to testifying,

to a tape recording of a conversation and notes of other conversations in which he is alleged to have participated.

Judge Owen's decision is unreported. His Order was inscribed on the motion papers. The Order noted "see minutes of this date." Judge Owen's Order and the minutes are reproduced in the Joint Appendix ("J.A.") at pp. 3a and 74a-86a, respectively.

ISSUE PRESENTED

Whether in the interest of justice a prospectively immunized witness, who is unable to recall specifics of conversations which the Department says are recorded and memorialized, should be allowed, prior to testifying before the Grand Jury, access to the tape and notes?

STATUTES AND RULES

Relevant to this appeal is Rule 6(e) of the Federal Rules of Criminal Procedure, the text of which reads as follows:

Fed. R. Crim. P. 6(e):

"(e) Secrecy of Proceedings and Disclosure.
Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes

recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

STATEMENT OF THE CASE

A. The Proceedings Below

On June 28, 1976, by application for an order to show cause, this proceeding was commenced by the witness to compel the Department to grant access to a tape and notes of conversations, in which the Department claims the witness took part, and about which he has no specific recollection, for the purpose of refreshing his recollection prior to his appearance before the Grand Jury (J.A. 4a-5a).

The Order to Show Cause was granted by Judge Briant after a hearing on June 28, 1977 (J.A. 37a-44a) and the return date of the motion was set for June 30, 1977. On the application for the Order to Show Cause, and on the motion,

the witness contended that disclosure was not prohibited by Rule 6(e), Fed. R. Crim. P., as the Department had posited, because the tape and notes existed prior to and separate and apart from the Grand Jury proceeding and because disclosure was not sought to learn, and disclosure would not divulge, what the business of the Grand Jury was. Therefore, it was argued, the materials were not "matters occurring before the grand jury", to which Rule 6(e) applies (J.A. 26a-31a). The witness contended further that since these materials were not within the ambit of Rule 6(e)'s cloak of secrecy, he should be granted access to them prior to his appearance to enable him to be more useful to the Grand Jury when he testified and to prevent him from being prejudiced before the Grand Jury should the jurors view any failure of recollection on his part as evasiveness, lack of cooperation or even perjury (J.A. 11a).

The Department contended that disclosure was not permitted under Rule 6(e) and pursuant to an impoundment order entered by United States District Judge Kevin T. Duffy at the time the Grand Jury was empanelled* (J.A. 52a-54a).

* The impoundment order is itself, we are informed by the Department, impounded. However, a portion of the order was set forth by the Department in its papers below and it is discussed infra, in the note at p. 28.

After a hearing on June 30, 1977, Judge Owen denied the witness's motion, stating:

"I think the Government is entitled to his unvarnished recollection or absent [sic] of it, as the case may be, under the circumstances." (J.A. 85a).

The present appeal is from this determination.

Judge Owen denied a request for a stay pending appeal. The Department consented to a short postponement of the witness's scheduled appearance before the Grand Jury while counsel for the witness applied to this Court for a stay of Judge Owen's Order pending appeal. Such an application was immediately made, but the parties were advised by the Motion Clerk of this Court that a circuit judge was not available to hear the application. Since the Grand Jury was recessing on June 30 (the date of the decision below and the application in this Court) until early September 1977, the Department agreed not to seek sanctions against the witness for not appearing pending a hearing on the witness's application for a preliminary injunction pending appeal. Subsequently, a motion for an expedited appeal was granted and the motion for a preliminary injunction was withdrawn.

B. The Facts Relevant to This Appeal

The witness was subpoenaed in March, 1977 to testify before the Grand Jury in connection with its investigation of antitrust violations in the securities industry (J.A. 6a).^{*} Prior and subsequent to receiving the subpoena, the witness and his counsel were cooperating with the attorney in the Department's Antitrust Division who was directing the Grand Jury investigation, Robert E. Hauberg, Jr., (J.A. 7a).

The witness and his counsel met with Mr. Hauberg at Mr. Hauberg's request to provide Mr. Hauberg with an opportunity to speak to and question the witness on an informal basis. During the meeting the witness exhibited no specific recall as to certain events about which he was questioned by Mr. Hauberg (J.A. 7a).

Subsequent to that meeting, counsel for the witness had several telephone conversations with Mr. Hauberg in which Mr. Hauberg disclosed to counsel items of information supposedly discovered in the course of the investigation. It was understood by both Mr. Hauberg and counsel that the information divulged would be used in an attempt to refresh

* After several adjournments, the witness was scheduled to appear on June 27, 1977.

the recollection of the witness in order to advance the work of the Grand Jury.* The information was so used, but to no avail; the witness's recollection was not refreshed (J.A. 8a). Counsel believed the information supplied by Mr. Hauberg lacked sufficient detail to truly refresh anyone's recollection. Mr. Hauberg was so advised.

Mr. Hauberg eventually advised counsel of certain meetings or conversations which occurred more than one year ago and in which the witness is alleged to have participated.** Counsel relayed this information to the witness, but it did not refresh the witness's recollection (J.A. 9a).

When Mr. Hauberg was advised that counsel's effort using the information supplied by the Department proved ineffectual, Mr. Hauberg then informed counsel that he had in his possession a tape of one of the meetings and notes of

* For example, in its papers below, the Department indicated that the eliciting of "investigative leads" from this witness was one of the Department's objectives. (J.A. 49a).

** In its papers below, the Department claimed it has notes of an alleged conversation on June 3, 1976 between the witness and a second person recorded after the conversation by a Government attorney during an interview; notes of an alleged conversation between the witness and a second person on June 28, 1976, made by the second person; and a tape recording of an alleged conversation on June 11, 1976 among the witness, the second person and another person recorded by the second person and a transcript of that tape (J.A. 45a-46a).

another (J.A. 8a-9a). Counsel asked for access to the tape and the notes, believing that the materials would be the surest way to refresh the witness's recollection and advance the work of the Grand Jury. Mr. Hauberg indicated that he would have to consult his superiors about the request. Subsequently, he advised that it was the position of the Department that it was not permitted to disclose the notes and tape because of the grand jury secrecy rule and the impoundment order. Upon request of counsel the Department reconsidered, but refused to alter, its position (J.A. 9a-10a). Mr. Hauberg advised that if the witness's recollection did fail before the Grand Jury the Department would then seek to refresh it by confronting the witness with the materials sought herein. He also allowed that at that juncture the witness would be permitted to leave the Grand Jury room to speak to counsel (J.A. 10a-11a).

Counsel informed Mr. Hauberg that they believed the grand jury secrecy rule did not preclude access to these materials. Mr. Hauberg was also advised that if the Department was seeking to provide the Grand Jury with the witness's best recollection the surest way to do that would be to truly attempt to refresh the witness's recollection instead of merely providing cryptic morsels of information to counsel.

Counsel also advised that in light of the Department's position, and because they could foresee possible serious prejudice hovering about the witness, they felt it necessary to make a motion to obtain the access sought. In view of that posture, Mr. Hauberg consented to the witness's not appearing on the agreed return date of the subpoena, June 27 (J.A. 48a). However, on June 27, 1977, the witness was served with another subpoena requiring his appearance two days later -- on June 29 (J.A. 7a). On that same day (June 27) counsel was informed that an order had been signed which allowed the Department to grant the witness immunity in connection with his testimony before the Grand Jury (J.A. 62a).^{*} This immunity had been offered by the Department; counsel did not independently seek it (J.A. 38a, 77a). Counsel was also informed on June 27 that the Department "doesn't want" counsel to have those materials (J.A. 10a).

Consequently, on June 28, 1977, because of the imminence of the return date of the subpoena and because of concern that the witness was being placed in jeopardy by the

* While the witness may in fact be granted the immunity when he appears before the Grand Jury, he is still open to injurious consequences as a result of his appearance. Mr. Hauberg has referred to this witness as a "possible target" (J.A. 38a). Further, the immunity does not protect against a perjury indictment nor an indictment on the substantive offense if there is independent evidence of it.

Department's position, counsel obtained the Order to Show Cause. Judge Owen's Order and these proceedings followed.

We submit that the Department's position with respect to providing the access sought is totally inconsistent with its avowed desire to use this witness, for whom the Department voluntarily sought and acquired an order of immunity, to provide leads and otherwise advance the work of the Grand Jury.

We submit further that the Department's position disserves the proper administration of justice. If the Grand Jury is to best serve society's interests of carrying out a thorough and extensive investigation it should have available to it the best and clearest evidence -- presented in an understandable and meaningful fashion. Depriving this witness of the means available to refresh his recollection does not foster society's objectives.

Counsel is not alone in thinking the Department's position inconsistent and inefficient vis-a-vis the work of the Grand Jury. Judge Brieant, on the application for the Order to Show Cause, expressed this same thought when he asked the Department*:

* Judge Owen also apparently recognized the Department's position as inconsistent with a desire to use this witness to help the Grand Jury (J.A. 79a).

"If you are going to give him an immunity order, why don't you have an informal meeting and give him whatever documentation he needs to testify. If you are not going to give him an immunity order, I have to assume that unless the fellow's daft, he is going to take the fifth. So why are we going through all this nonsense?" (J.A. 38a-39a)

As Judge Brieant put it later, if the witness gets the immunity:

"from that time on he's on [the Department's] side, he is helping you and his testimony is totally useless if he sits in the grand jury and say I think such and such, and it turns out to be incorrect or mistaken, and then some criminal defendant gets access to that testimony . . . and cross examines this witness on a trial and says that isn't what you told the grand jury is it, Mr. Witness?"

Where is the point? Why don't you get a little practicability on this thing." (J.A. 39a)

Judge Brieant, we submit, summed up the controversy well:

"The whole thing is silly. Either you are going to use the fellow as a fruitful witness, in which case you have to get his recollection refreshed or you are going to treat him as a target." (J.A. 43a)

POINT I

THE GRAND JURY SECRECY RULE IS NOT APPLICABLE

Not only does it make good practical sense from the Grand Jury's point of view for the Department to provide this witness (to whom immunity is to be granted) with the materials sought, but there is no prohibition to such disclosure because the materials are not "matters occurring before the grand jury."* (Fed. R. Crim. Proc. 6(e)) Accordingly, the witness's motion should have been granted.**

* While this point was urged below, the District Court did not address this argument at the hearing on June 30 (J.A. 74a-86a). In fact, except for a brief reference to a case cited by us (see In re Braniff Airways, Inc., discussed below), with respect to which the Court indicated its disagreement, the Court did not directly address any of the arguments made below. Rather, the whole basis of the Court's decision was that the Government is not obliged to prepare, or allow counsel to prepare, the witness prior to his appearance before the Grand Jury (J.A. 84a-85a). We respectfully submit that that analysis misses the thrust of our position that (a) the rule of secrecy does not bar access and (b) both the work of the Grand Jury and the protection of the rights of this witness, whom the Department would like to use to provide leads, are best served by the access sought.

** The witness's standing to seek these materials is clear. In In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975), witnesses subpoenaed before a grand jury sought access to transcripts of their prior testimony before that jury, and such access was granted despite Government opposition. (Braniff is discussed infra, at pp. 24-25.) Moreover, if civil third party litigants are granted access to grand jury material, see Capitol Indemnity Corp. v. First Minnesota Construction Co., infra, at p. 19, and Davis v. Romney, infra at pp. 17-18), surely a witness subpoenaed to appear before a grand jury who seeks access to a tape and notes of conversations in which he participated has a more compelling interest in obtaining access to materials than any such third party.

In sharp contrast to those cases where grand jury transcripts are sought and where, consequently, the provisions of Rule 6(e) control, the witness here does not seek to learn, nor will he learn if he obtains access to the materials sought, what has transpired before the Grand Jury.* The witness seeks only access to notes and a tape of conversations in which he allegedly participated and he seeks them solely for their own intrinsic value. These materials were in existence long before the Grand Jury was empanelled.

In these circumstances, Rule 6(e) is inapplicable and does not bar the access sought. United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972); Commonwealth Edison Co. v. Allis Chalmers Mfg. Co., 211 F.Supp. 729, 734 (N.D. Ill. 1962); In Re Hearings Before The Committee On Banking and Currency Of The United States Senate, 19 F.R.D. 410 (N.D. Ill. 1956), vacated on other grounds, 245 F.2d 667 (7th Cir. 1957).

Rule 6(e) deals with "[d]isclosure of matters occurring before the grand jury." The tape and notes were not made in the grand jury room. They are not a tape and

* The Department did not argue below that disclosure would have any such forbidden effect.

notes of the conduct by the Grand Jury of its work. They are a tape and notes of what occurred outside of the grand jury room before the grand jury was convened. They relate to what is claimed to have been said by parties other than grand jurors or those other persons who are, by the express terms of Rule 6(e), barred from making certain disclosures of what occurred in the grand jury room.

Rule 6(e) specifically states that:

"No obligation of secrecy may be imposed upon any person except in accordance with this rule."

Thus, since Rule 6(e) only prohibits disclosure, (except with consent of a court) of what occurred before the grand jury, disclosure by the Department of these materials is not prohibited.*

The fact that the Department obtained these materials by subpoena does not alter the result. Rule 6(e) does not specifically state that materials in the possession of the Government under a grand jury subpoena are secret. Thus, since secrecy is imposed only as to the specifics of what occurred before the grand jury, the fact that the Department obtained the materials in compliance with a grand jury

* To the extent that the impoundment order is contrary to Rule 6(e), it should not form a basis for not granting this particular witness the access he seeks. We submit, however, that the impoundment order is not contrary to Rule 6(e). See discussion, infra, in footnote on p.28.

subpoena is irrelevant. Moreover, we assume that the Department would argue that even if the materials were received voluntarily from their originator, since they were received in connection with a grand jury proceeding, they are secret. Since we assume that the Department's position would be the same regardless of how the materials were obtained by it, there is no difference in result where a subpoena compelled the delivery of the materials.

A reading of Rule 6(e) reinforces the conclusion that what is referred to as being secret is what occurs before the grand jury -- in the grand jury room. The first sentence gives a government attorney the right to be privy to what occurs in the grand jury room, except for deliberations and votes. Thus, it must be assumed that the attorneys for the government may discuss among themselves what occurs in the grand jury room. The next sentence starts with the word "[o]therwise". The use of the word in this context must have some meaning. We submit that it means that otherwise than an attorney for the government, who has been given specific permission by the first sentence to discuss what occurs with his fellow attorneys, those other persons who are present in the grand jury room [and each such person is

enumerated, including stenographers] may not "disclose matters occurring before the grand jury." Moreover, the rule refers to "matters occurring". "Matters occurring" are not documents or tapes. "Matters occurring" are events. Thus, a fair reading of all of Rule 6(e) indicates that there is no intention to create a secret document out of a non-secret pre-existing document merely because it may have been produced in a grand jury room.

This Court has recognized the distinction between what occurs in a grand jury room and documents originated outside by third parties in United States v. Interstate Dress Carriers, Inc. 280 F.2d 52, 54 (2d Cir. 1960):

"...[T]he Rule is intended only to protect against disclosure of what is said or what takes place in the grand jury room."

The Interstate Dress Carriers case is the leading authority holding that documents sought for their own intrinsic value are not within the purview of Rule 6(e). There, the Interstate Commerce Commission sought access to the records of Interstate Dress Carriers, who was unable to comply because the records were in the possession of the Justice Department pursuant to a grand jury subpoena. The Justice Department applied for leave to allow the I.C.C. access to the subpoenaed records. This Court affirmed the district

court's determination that the documents could be disclosed, explaining:

[W]hen testimony or data is sought for its own sake-- for its intrinsic value in the furtherance of a lawful investigation -- rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. [cite omitted].*

Id. at 54.

Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972) demonstrates that the principles enunciated in Interstate Dress Carriers, supra, do not apply only to governmental agencies. There, private litigants sought disclosure of certain Housing and Urban Development materials which were in the possession of a grand jury. Defendants asserted that they were precluded from disclosing the materials and moved

* The Court noted further that there would be no compromise of the secrecy of the grand jury since the I.C.C. was not seeking to learn what use the grand jury had made of Interstate's records but merely wished to inspect records which happened to be in the possession of the grand jury. In the Court's opinion:

"No question of the disclosure of matters occurring before the grand jury [was] therefore involved and Rule 6(e) [did] not prohibit the examination."

Id. at 54.

for a protective order; the motion was denied. The Court noted that plaintiffs were not seeking to discover what use the grand jury was making of the materials sought or to discover upon whom the grand jury was focusing its attention and for what crimes. They sought only the information contained in the materials, information which "does not reflect upon and is not inextricably intertwined with the deliberation or work of the grand jury." Id. at 341. Since, as here, disclosure of the materials would not "expose or reveal what 'occurr[ed]' when the grand jury examined the material" the Court found Rule 6(e) inapplicable.*

* In so concluding, the court contrasted the question before it with cases where Rule 6(e) was held applicable; the distinctions cited fully apply here:

This is not a situation in which the proponents of disclosure seek transcripts of testimony given before the grand jury....[cites omitted] Nor is it one in which they seek minutes or records of the grand jury....[cites omitted] Nor further is it one in which proponents seek information gained by the grand jury from a person's records or documents[cite omitted] Nor finally is it one in which they seek "all books, pamphlets, documents, and papers presented to the Grand Jury," ... [cite omitted] or "a list of the documents...to be inspected by the Grand Jury." [cite omitted] In each of the cases cited above, the proponents sought to inquire into the grand jury's work either by examining its transcripts, records, or minutes or by ascertaining what specific documents passed before it. Disclosure would in those cases suggest some specific act, thought, or focus of the grand jury, hence the application of Rule 6(e) by the courts.

Id. at 342.

A similar situation was presented in Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975), where plaintiff moved for access to certain documents from the defendant who refused to produce them on the ground that they were in the possession of the United States Attorney in connection with an ongoing grand jury investigation. The Government opposed the motion, arguing, as it posits here, that disclosure was barred by Rule 6(e). That position was rejected, the Court noting:

plaintiff's request seeks these documents for their own intrinsic value; not to discover what has transpired before the grand jury.

Id. at 931.

The witness here wants these materials solely for their own value, to aid in refreshing his recollection so that he might better assist the Grand Jury in its investigation and to avoid any possibility that because of his poor recollection, he will, unwittingly, expose himself to other penalties.*

* As a former United States attorney for the District of Maryland (S.H.Sachs) has recently reminded us:

"The [grand jury] inquiry takes place in a setting where the threat of a perjury indictment or a contempt proceeding is a brooding omnipresence for the witness perceived to be untruthful or recalcitrant." S. H. Sachs and R. L. Levin, Preparing Grand Jury Witnesses: Some Practical and Legal Points, LITIGATION, Spring, 1977 at 26.

Indeed, the Department is seeking to use this witness to advance the investigation and possibly provide leads to others. (J.A. 49a). In this context, it is well to keep in mind that the purpose of a grand jury investigation is to obtain the truth in the best and most thorough manner available. In Re Braniff Airways, Inc., 390 F.Supp. 344, 347 (W.D. Tex. 1975). The purpose of the grand jury is not to trap or otherwise embarrass a witness, whether he is a target or not. Neither is its purpose to obtain perjury indictments, but rather to investigate the underlying facts to determine whether or not there has been a violation of any federal criminal statute.

To achieve the purpose for which the Grand Jury sits, it is best that a witness, especially a cooperative witness for whom an immunity order has been obtained, be as well prepared as possible. Thus, as was stated by Chief Judge Spears in granting the application for disclosure of grand jury transcripts in the Braniff case, supra:

Even if, as suggested by the government, the witnesses are extended immunity from prosecution thereby eliminating the risk of perjury, the search for the truth by the grand jury will be better served if the witnesses are prepared to give meaningful and accurate testimony. In this connection, there has been no suggestion that either witness has been in contempt of, or has committed perjury before, the grand jury.

Id. at 347.*

That reasoning, as Judge Brieant recognized (see pp. 10-11, supra), applies as well in the instant case, and the Department has not demonstrated that such disclosure would hinder the Grand Jury's investigation herein.** Indeed, disclosure is sure to have precisely the opposite effect.*** Under these circumstances:

"[t]o say as [the Department would have it] that the Grand Jury has a Midas like quality in that everything it touches becomes a secret does not comport with the language of the Rule 6(e) which contemplates keeping secret only 'matters occurring before the grand jury.'"

Davis v. Romney, supra, at 341.

* The Braniff case is discussed infra at p. 25.

** The only "prejudice" alluded to by the Department (J.A. 49a) had nothing to do with protecting the secrecy of the grand jury. The "prejudice" was nothing more than an unsupported suspicion that this witness might somehow tailor his testimony. (J.A. 49a) Yet, this is a witness to whom certain limited disclosures have already been made and for whom an immunity order has been obtained. This is a witness who seeks to cooperate and has cooperated with the Department. We cannot understand the logic--if there is any--in the Department's position.

*** The Department intends to use these materials to refresh the witness's recollection in the grand jury room. Thus, sooner or later the witness will be given "access" to the materials. We submit that since that is the case, access should be given prior to testifying in order to avoid the lurking threat of perjury and to best serve the investigative role of the Grand Jury.

POINT II

EVEN IF THESE MATERIALS WERE
WITHIN THE SCOPE OF RULE 6(e),
SUFFICIENT NEED EXISTS
REQUIRING DISCLOSURE

If it were assumed, arguendo, that the tape and notes in question were "matters occurring before the grand jury" -- and they are not -- their disclosure still would not be barred because the witness has a particularized need sufficient to warrant disclosure. Moreover, the attorneys for the Department are specifically allowed, under Rule 6(e), access to these materials "for use in the performance of their duties." Accordingly, assuming they chose to use these materials to refresh the witness's recollection, such use would not be barred -- but would be permitted -- by the Rule.*

Rule 6(e) does not preclude disclosure of all matters "occurring before the grand jury". Disclosure of such matters may be had if the party seeking such disclosure

* Given that the Department is empowered to grant the witness access to the materials and given that it voluntarily disclosed the existence of the materials and what they purport to contain, we must urge that the Department has waived any right to assert that disclosure is barred by Rule 6(e). In Re Biaggi, 478 F.2d 489 (2d Cir. 1973); United States v. Carter Products, Inc., 27 F.R.D. 243 (S.D.N.Y. 1961).

can show a "particularized need" for the materials. Dennis v. United States, 384 U.S. 855 (1966); Pittsburg Plate Glass Co. v. United States, 360 U.S. 395 (1959); Smith v. United States, 423 U.S. 1303 (Douglas, Circuit Judge, 1975).

Rule 6(e) has been interpreted largely in connection with requests for disclosure of either transcripts of testimony before the grand jury or minutes of the proceedings of the grand jury. Dennis v. United States, *supra*; Pittsburg Plate Glass Co. v. United States, *supra*; United States v. Procter & Gamble Co., 356 U.S. 677 (1958). Such cases go to the essence of the problem to which Rule 6(e) was addressed because transcripts and minutes obviously reveal the actual proceedings of the grand jury.

In contrast, disclosure of documents which pre-date the existence of the Grand Jury and which are produced by third parties in connection with a grand jury investigation will not reveal the proceedings of the Grand Jury. Thus, the context in which this proceeding arises is far different from the question before the courts considering "need" *vis-a-vis* the protection to be accorded grand jury transcripts. Assuming, *arguendo*, that these documents fall within Rule 6(e), the need required to overcome the policy of secrecy in

cases involving documents and similar materials should not have to be nearly as compelling as that required in cases involving transcripts.

While we urge that the need which should be required here -- if any -- is less than would be required in a transcript case, the need present here is of a sufficiently compelling nature so as to justify disclosure, whatever the applicable standard. In In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975)*, a Grand Jury witness moved to obtain access to his prior grand jury testimony in order to prepare himself to testify again and in order to refresh his recollection and to alleviate the possibility of inadvertent misstatement which might lead to perjury charges. The Government opposed the motion on the grounds, inter alia, as it does here, that the witnesses might "'program' their . . . testimony within the limits of their previous answers." Id. at 345. The Court found that the witnesses' "need" to prepare adequately for their grand jury appearances, and the interests of the Grand Jury in obtaining the truth, outweighed the policy of secrecy surrounding transcripts, stating:

* Judge Owen thought Braniff distinguishable and stated that, "if the Braniff case were before me, I would have decided it the other way." (J.A. 84a).

Under the peculiar circumstances of this case, this Court believes that fundamental fairness, as well as the administration of justice, require that each of the witnesses, . . . be allowed a reasonable opportunity to review the transcript of his own testimony prior to his appearance before the grand jury. . . ."

Id. at 347.

The instant proceeding presents a far more compelling case for disclosure than did Braniff. The same reasons warranting disclosure there are present here. But here grand jury transcripts, which clearly fall within Rule 6(e)'s shroud of secrecy, are not sought. The witness here needs the materials to refresh his recollection about conversations the Department asserts that he had. He will be called before the Grand Jury to testify about those conversations. Since he lacks recollection with respect to them and since the means are readily available to refresh that recollection, it is only elemental fairness that the Department proceed to do so without setting up this witness for embarrassment or other more injurious penalties. It obviously does not suffice to avoid these risks to offer, as the Department does, that if his recollection fails and he is confronted with the materials he may leave the grand

jury room to consult counsel. Indeed, if anything, that increases the possibility of prejudice rather than eliminating it.

Moreover, the proper administration of criminal justice requires the result sought. The whole purpose of the Grand Jury is to get to the bottom of matters. The Department believes this witness can provide leads to others whom it may want to investigate. It voluntarily sought an immunity order for him and voluntarily disclosed the fact of the meetings and the existence of the notes and tape. If the search for the truth is the real objective of the Department -- it is, of course, the objective of the Grand Jury -- there is no better method of effectuating that investigative function than ensuring that the witness has had ample, but less dramatic, opportunity for refreshing his recollection than he will obtain in the Grand Jury room.

Thus, we submit that "fundamental fairness, as well as the administration of justice" (390 F.Supp. at 347) require that the witness be granted access, before he testifies, to the materials in question.

Although the Department has argued that it cannot disclose the materials, we cannot imagine that it posits

that contention seriously. We submit, instead, that for reasons we cannot fathom it does not want to disclose the materials (J.A. 10a).^{*} The reason that the Department is not barred is found in the very Rule it cites on its behalf -- Rule 6(e). Under Rule 6(e) the Department would be free to disclose these materials to the witness if it so desired, since that Rule permits disclosure of matters occurring before the grand jury to attorneys for the government "for use in performance of their duties". See In re Biaggi, 478 F.2d 489, 492 (2d Cir. 1973). Since it is clearly one of the duties of Government attorneys to interview prospective witnesses and review their testimony with them (United States v. American Radiator and Standard Sanitary Corporation,

* The refusal of the Department to disclose these materials is all the more incomprehensible when it is considered that if the witness is a "possible target" and is subsequently indicted the witness would be able to obtain disclosure of these materials under Rule 16 of the Federal Rules of Criminal Procedure. Thus, unless the Department is seeking to use the Grand Jury as a vehicle to obtain perjury indictments, it is difficult to comprehend its refusal to grant access to these materials to a cooperative witness.

45 F.R.D. 477 (W.D. Pa. 1968)) Rule 6(e) empowers the Department to proceed as we urge here.*

* Besides Rule 6(e), the Department also asserted below that it could not grant access because of an impoundment order (J.A. 52a-53a). The order itself is impounded, and thus appellant's counsel knows of only the portion quoted by the Department in its papers below:

"IT IS FURTHER ORDERED that, upon making suitable arrangements with the attorneys of the Antitrust Division assigned to the matter, any person who has produced any of the documents impounded hereunder may have reasonable access, for inspection and copying, to the documents which he has produced. Such person, however, shall not have access to any other documents." (J.A. 53a).

That order, drafted in a totally different context, makes clear that a subpoenaee has no right under the order to another's documents; it does not, however, prevent the Department from using these materials as it sees fit. Surely, the Department can have access to these materials for use in performing its duties. Indeed, the Department has in fact used the materials in that fashion by advising counsel of their existence and the fact of the conversations. One of the duties of a prosecutor includes interviewing prospective witnesses before the grand jury. United States v. American Radiator & Standard Sanitary Corporation, supra. Consequently, if the Department had chosen to make these materials available to the witness in preparing him to testify there would have been no bar to its doing so. Further, the Department admitted below (J.A. 45a-46a) that some of the notes sought were not made by a person who produced them under subpoena. Accordingly, those notes are in no sense within the purview of the order.

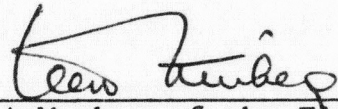
CONCLUSION

The order of the District Court should be reversed.

Dated: New York, New York
July 22, 1977

Respectfully submitted,

Reavis & McGrath

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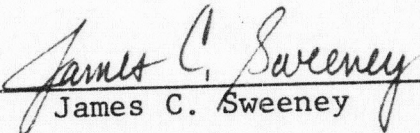
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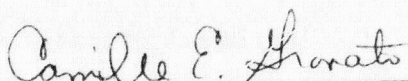
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JAMES C. SWEENEY, being duly sworn, deposes and
says:

I am not a party to this action. On July 22,
1977, I served a copy of the annexed Appellant's Brief
and Joint Appendix upon The United States Department of
Justice, Antitrust Division, Attn: John Powers, Esq.,
Washington, D.C. 20530 by causing the same to be deposited
at a United States Postal Service Office in a post-paid,
properly addressed envelope for delivery by Express Mail
to said attorney at the address above stated.


James C. Sweeney

Sworn to before me this
22nd day of July, 1977.



Notary Public

CAMILLE E. GRANATO
NOTARY PUBLIC, State of New York
No. 31-1532330
Qualified in New York County
Commission Expires March 30, 1979